

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

LAWRENCE L. BARRIENTEZ,)
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Petitioner,)
)
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vs.) No. CIV-18-1020-C
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)
JIMMY MARTIN, Warden)
)
)
Respondent.)

ORDER ADOPTING REPORT AND RECOMMENDATION

Petitioner received preliminary permission from the Tenth Circuit to file a second or successive petition for habeas corpus pursuant to 28 U.S.C. § 2254 challenging the constitutionality of his state court convictions. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), the matter was referred to United States Magistrate Judge Bernard M. Jones, who entered a Report and Recommendation (“R&R”) on February 26, 2019, recommending the Court deny Petitioner a Certificate of Appealability (“COA”). Petitioner has timely objected.

Judge Jones accurately sets out the substantive facts and law, and the Court only highlights a few points to address the argument raised by Petitioner. First, the Court notes that Petitioner argues that a three-judge panel of the Circuit found the factual predicate for his claim in granting the COA. On this issue, Petitioner misstates the nature of the Circuit’s finding. As Judge Jones noted, the Circuit makes only a preliminary finding of possible merit, rather than a determination on the merits of the case. Case v. Hatch, 731 F.3d 1015, 1028 (10th Cir. 2013). Thus, rather than establishing that Petitioner has shown

he could not have timely discovered the prosecutorial misconduct, the Circuit's decision merely noted that Petitioner had raised a question on the issue. It is for this Court to determine in the first instance whether there is factual support for that claim. As Judge Jones noted in the R&R, Petitioner has failed to make this showing. As set forth more fully by Judge Jones, the evidence demonstrate Petitioner could have, with the exercise of due diligence, discovered the alleged wrongdoing as early as 2008. Accordingly, habeas relief is not warranted.

As set forth more fully herein, the Court adopts, in full, the Report and Recommendation of the Magistrate Judge (Dkt. No. 16). The Motion to Dismiss Second and Successive Habeas Petition (Dkt. No. 7) is GRANTED. Petitioner's habeas petition (Dkt. No. 1) is DISMISSED for lack of jurisdiction. A separate judgment will issue.

IT IS SO ORDERED this 14th day of March, 2019.



ROBIN J. CAUTHRON
United States District Judge